

**Nebraska Ethics Advisory Opinion for Lawyers
No. 06-07**

ETHICAL ISSUES

WHETHER AN ATTORNEY MAY TAPE RECORD A TELEPHONE CONVERSATION OR AN IN-PERSON COMMUNICATION WITH A NON-CLIENT WITHOUT DISCLOSING THE FACT THAT THE COMMUNICATION IS BEING RECORDED.

STATEMENT OF FACTS

An attorney, during the course of his practice of law, believes it would be helpful to be able to record telephone conversations of witnesses (non-client) without disclosing to that individual that the attorney is recording the conversation. The attorney had not done this in the past because of a concern about whether it would violate any aspect of professional ethics adopted by the Nebraska Supreme Court. The attorney asks for an opinion from this Committee regarding the non-disclosed recording of these conversations.

NEBRASKA RULES OF PROFESSIONAL CONDUCT

RULE 1.3 DILIGENCE. A lawyer shall act with reasonable diligence and promptness in representing a client.

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS. In the course of representing a client, a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person.

RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS. (a) in representing a client, a lawyer should not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

RULE 8.4 MISCONDUCT. It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or to do so through the acts of another; (b) commit a criminal act that reflects adversely on the lawyers honesty, trustworthiness or fitness as a lawyer and other respects; or (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

DISCUSSION

On June 24, 2001, the American Bar Association issued Formal Opinion 01-422 relating to "Electronic Recordings by Lawyers Without the Knowledge of all Participants." That opinion withdrew Formal Opinion 337 (1974) and determined that a

lawyer who electronically records a conversation without the knowledge of the other party or parties does not necessarily violate the Model Rules; that undisclosed taping is not in and of itself unethical unless prohibited by the law of the relevant jurisdiction. However, for more than twenty-five years, it was the position of the ABA that undisclosed taping by any lawyers other than law enforcement officials was unethical.

ABA Formal Opinion 01-422 offers a variety of reasons for abandoning the general prohibition against undisclosed taping. The Opinion suggested that reversal of the prohibition against undisclosed taping is warranted by an intervening change in societal attitudes and practices with respect to undisclosed taping. According to the ABA:

The belief that nonconsensual taping of conversations is inherently deceitful, embraced by the Committee in 1974, is not universally accepted today. The overwhelming majority of states permit recording by consent of only one party to the conversation. Surreptitious recording of conversations is a wide spread practice by law enforcement, private investigators and journalists, and the courts universally accept evidence acquired by such techniques. Devices for the recording of telephone conversations on one's own phone readily are available and widely are used. Thus, even though recording of a conversation without disclosure may to many people "offend a sense of honor and fair play," it is questionable whether anyone today justifiably relies on an expectation that a conversation is not being recorded by the other party, absent a special relationship with or conduct by that party inducing a belief that the conversation will not be recorded.

ABA Formal Opinion 337 failed to explain how the unconsented recording of a conversation by an attorney constitutes "dishonesty, fraud, deceit or misrepresentation" other than in specific situations in a criminal prosecution context. It appears, however, that this conclusion was based on an assumption that anyone speaking with an attorney would justifiably believe the conversation was not being recorded. With that assumption in place, an attorney's failure to advise that a conversation is being recorded is the equivalent of a representation by the lawyer that a conversation is not being recorded. It would then logically follow that an attorney who records a conversation without giving notice or obtaining consent has engaged in misrepresentation or deceit because the attorney has recorded a conversation after impliedly representing that the conversation was not being recorded. However, in the absence of this assumption, there is no basis for finding an implied representation that conversations with attorneys will not be recorded. If there is no implied representation that attorneys will not record conversations, there is no basis for a finding of dishonesty, fraud, deceit, or misrepresentation from a failure by an attorney to disclose that the conversation is being recorded.

As reflected on page 4 of ABA Formal Opinion 01-422, the conclusion that undisclosed recording by attorneys was unethical, which appeared to have general acceptance in 1974, has been the subject of a great deal of disagreement by courts, ethics committees and commentators over the intervening years. The controversy has produced many exceptions in various jurisdictions for such activities as documenting criminal utterances, documenting conversations with potential witnesses to protect against later perjury, documenting conversations for self-protection of a lawyer, gathering evidence in housing discrimination and trademark infringement cases, and recording when specifically authorized by statute, court rule or court order. All of these exceptions recognize the value of a recorded statement when the content of a conversation is disputed. Absent these exceptions, one might ask the question “why would an attorney want to record a conversation without disclosing that the conversation is being recorded?” But the numerous exceptions reflect that in some circumstances, there may be legitimate reasons for undisclosed recording by or at the discretion of an attorney. According to ABA Formal Opinion 01-422:

A degree of uncertainty is common in the application of rules of ethics, but an ethical prohibition that is qualified by so many varying exceptions and such frequent disagreement as to the viability of the rule as a basis for professional discipline is highly troubling. We think the proper approach to the question of legal but non-consensual recordings by lawyers is not a general prohibition with certain exceptions, but a prohibition of the conduct only where it is accompanied by other circumstances that make it unethical.

As noted above, the determination that nonconsensual recording of a conversation by an attorney is not per se unethical or constitutes unprofessional conduct is applicable only if the recording is not prohibited by state law or regulation. As noted in a 1998 law review article, at that time, the recording of a conversation without the consent of all parties was illegal in twelve states; California, Connecticut, Delaware, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Pennsylvania, and Washington. See Stacy L. Mills, Note, He Wouldn't Listen to Me Before, But Now. . .: Interspousal Wiretapping and an Analysis of State Wiretapping Statutes, 37 Brandeis L.J. 415 (Spring 1998). In addition, while Oregon permits telephone conversations to be recorded without the consent of all parties, but prohibits undisclosed taping of in-person conversations. Or. Rev. Stat. §165.540 (1999). However in Nebraska, one party can legally record a conversation without the consent of all parties. According to Neb. Rev. Stat. §86-290 (2) (c) (cum. Supp. 2004):

It is not unlawful under §86-271 to 86-295 for a person not acting under color of law to intercept a wire, electronic, or oral communication when such person is a party to the communication or when one of the parties to the communication has given prior consent to such interception

unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any state.

Other states have issued formal opinions agreeing with and adhering to the conclusion of ABA Formal Opinion 01-422. Alaska Ethics Op. 2003-1 (2003); Michigan Informal Ethics Op. RI 309 (1998); New York County Ethics Op. (1993). However, this trend towards leniency regarding covert recording has not received unanimous acceptance. A New York City Bar Ethics Opinion found the ABA's amended position to be an "overcorrection." According to New York City Ethics Op. 2003-02 (2003), a lawyer may tape a conversation without disclosure of that fact to all participants if the lawyer has a reasonable basis for believing that disclosure of the taping would significantly impair pursuit of a generally accepted societal good. However, undisclosed taping was determined to entail a sufficient lack of candor and a sufficient element of trickery as to render it ethically impermissible as a routine practice. The New York City Ethics Committee did not share the ABA's basis with respect to whether individuals today can justifiably assume that a conversation is not being recorded, particularly when the conversation is with an attorney. It characterized the practice of undisclosed taping by an attorney as "smacking of trickery." However, the New York City Opinion found that there would be no need for the imposition of sanctions for this ethical violation as long as the attorney had a reasonable basis for believing that the surrounding circumstances warranted undisclosed taping. It appears to this Committee that this type of subjective analysis after-the-fact is so uncertain as to render this position unworkable.

The New York City Ethics Opinion opined that undisclosed taping deprives an individual of the ability to choose their words with greater care and precision which is what a person would do when a verbatim record is being made. Additionally, undisclosed taping also confers upon the party making the tape the unfair advantage of being able to use the verbatim record if it helps his cause and to keep it concealed if it does not. Therefore, it has the potential effect of undermining public confidence in the integrity of the legal profession, which in turn undermines the ability of the legal system to function effectively. This Committee understands that an undisclosed recording might be used in a manner that would be harmful to an individual. Examples of this include recording or preserving only portions of the conversation to distort its content, using a recording to embarrass the other party to the conversation or a third party, or improper disclosure of a client confidence contained in a recording. However, the Committee feels that any such misuse of a recorded statement can be addressed by application of the Rules without straining to interpret the Rules as creating a per se prohibition against undisclosed recording.

Finally, because the simple act of recording does not, in and of itself, cause direct harm to anyone, there is a natural temptation to address the ethical acceptability of such recording by analyzing the potential effects of widespread attorney recording on candor and free discussion. However, this opinion only evaluates professional ethics, not privacy rights or other related issues. If a court would determine that an attorney's

undisclosed recording violates the Nebraska Constitutional Right to Privacy or some other law, then such undisclosed recording would also be unprofessional.

CONCLUSION

It is the opinion of this Committee that, while the better practice for attorneys is to disclose or obtain consent prior to recording a conversation, attorneys are not per se prohibited from ever recording conversations without the express permission of all other parties to the conversation. Absent conduct reflecting actual misrepresentation, deceit or fraud when taping a conversation, or circumstances in which the taping violated existing law or infringed upon a specific court-defined privacy right, an attorney does not act unethically by recording a conversation with a third party without disclosure of such recording.